

1. The preliminary hearing Order should be affirmed. On June 16, 2000, claimant injured both feet when they were run over by a fork lift.

2. Based on claimant's testimony, the Board finds that claimant's injuries did not result during horseplay. That conclusion is also supported by an Emergency Room Report from Clay County Medical Center dated June 16, 2000, that indicates that the accident occurred as claimant leaned over to pick up his gloves and the fork lift ran over his feet. Moreover, the surgeon who operated on claimant, Dr. Allan D. Holiday, obtained a history on the date of the accident that also indicates that the fork lift ran over claimant's feet while he was trying to get his gloves. Dr. Holiday's history, which is set forth in the record entitled History & Physical from Mercy Health Center, reads:

The patient is a very pleasant 17-year-old boy who lives in Clay Center, Kansas. He works at Fullerton [sic] Lumber Company. He reports he was trying to get some gloves off the back of a fork lift when it backed up over his feet. Specifically it backed up over his right midfoot and his left forefoot. He sustained an obvious open fracture dislocation of his right forefoot and superficial injuries to his left foot. . . .

The Board is aware that a document entitled Emergency Record from Clay County Medical Center dated June 16, 2000, indicates that claimant's accident occurred when he lost footing on a fork lift, but that document does not indicate where that history was obtained. At this juncture of the proceeding, the Board believes that the history of the surgeon, Dr. Holiday, is more accurate than the conflicting report taken from unknown sources in the hospital emergency room immediately after the accident.

3. After considering the record compiled to date, the Board finds that claimant's feet were pinned by one of the fork lift's back tires while claimant was walking beside it and retrieving his gloves. The fork lift driver, Morgan Michaud, denies seeing or talking with claimant immediately before the accident. But Mr. Michaud did testify that claimant had previously inquired about his gloves.

4. The evidence fails to establish at this juncture of the proceeding that claimant was attempting to jump onto the fork lift when the accident occurred as suggested by the testimony of claimant's coworker Ryan Liby. Mr. Liby's description of the incident is not particularly persuasive as it placed claimant within inches to the immediate right of Mr. Michaud who did not see claimant. The Board also notes the inconsistencies in the statements that Mr. Liby provided the insurance investigator and Mr. Liby's sworn testimony.

5. Despite the conflicting evidence, Judge Benedict found claimant's testimony persuasive and awarded him preliminary hearing benefits. In this instance, the Board gives some deference to the Judge's determination and also concludes that claimant has proven

that he sustained personal injury by accident arising out of and in the course of employment with respondent.

WHEREFORE, the Board affirms the December 18, 2000 preliminary hearing Order.

IT IS SO ORDERED.

Dated this ____ day of February 2001.

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Vincent A. Burnett, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director